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'N THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

BRIEF OF PETITIONER.

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IN THE

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No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

BRIEF OF PETITIONER.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit sought to be reviewed is reported in 106 Fed. Rep. [2] 217.

JURISDICTION.

The petition for writ of certiorari was prosecuted pursuant to the provisions of Section 240 of the *Judicial Code (Title 28, Section 347, U. S. Code)* and *Section 24 of the Bankruptcy Act [Chandler Bill, Title 11, Section 47 (c), U. S. Code]*.

(a) There are involved matters of general importance respecting the jurisdiction of the bankruptcy court, and its authority to enter appropriate orders conserving perishable and fugitive substances in litigation pending determination of actual or constructive possession of the *res* by trustee in bankruptcy, and the decision of the lower court in this respect is in conflict with such decisions of this court as *Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426, 432.

(b) The decision sought to be reviewed is in direct conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit handed down November 6, 1939, in *Carter Oil Co. v. Welker et al.*, set forth in the appendix to this brief, respecting interpretation of the conveyance by an Illinois warranty deed of a strip of land to a railroad company followed by a description of the use, as, for example, "*a strip of land for railroad right of way.*"

(c) The decision sought to be reviewed is in direct conflict with a long line of authoritative decisions of the Supreme Court of Illinois with respect to the conveyance of a strip of land in Illinois for use as a railroad right of way as hereinafter more fully stated.

(d) The decision sought to be reviewed in its interpretation of the words "*over and across*," as used in such a conveyance is in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen*, 5 Fed. (2) 160, 162.

STATEMENT.

Petitioner is the duly appointed, qualified and acting Trustee of Missouri-Illinois Railroad Company, a subsidiary debtor in the reorganization proceedings of Missouri Pacific Railroad Company, pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, under the provisions of Section 77 of the Bankruptcy Act.

The line of the Missouri-Illinois Railroad traverses the recently proven Salem oil field in Marion County, Illinois. Adverse claims to the oil underlying the right of way were asserted by Magnolia Petroleum Company and Ohio Oil Company, predicated upon certain alleged leases, on the theory that petitioner has a mere easement in the rail road right of way. Petitioner has contended and now contends that the deeds to his predecessor in interest respecting the strip of land on which the railroad is situated conveyed the fee-simple title, including oil and mineral rights. The controversy primarily concerns the interpretation of the granting clause of these warranty deeds, which conveyed to Centralia & Chester Railroad Company, Trustee's predecessor in interest, certain strips of land for right of way of said Railroad Company, to wit (R. 3):

By warranty deed dated August 13, 1896, from *William* and *Emma Young* to said Railroad Company (involved in the Magnolia Company claim—R. 58),

> "A strip of Land for right of way for said Railroad Company Sixty feet wide over and across the South West quarter (¼) of the North East quarter (¼) of Section Twenty (20) Town Two (2) North, Range Two (2) East of the third principal Meridian."

By warranty deed dated August 14, 1896, from *Caleb* and *Sarah Bower* to said Railroad Company (involved in claim of The Ohio Company—R. 68):

"A strip of ground Sixty six (66) feet wide for right of way for said Railroad Company over and across the East half (½) of the North West quarter (¼) of the South West Quarter (¼) of Section Twenty (20) in Township Two (2) North, Range Two (2) East of the third principal Meridian."

By warranty deed dated January 3, 1898, from *Caroline Rasler* to said Railroad Company (involved in claim of The Ohio Company—R. 68):

"A strip of ground for right of way for said Company Sixty feet (60) wide over and across the South East quarter (¼) of the North East quarter (¼) and the West half (½) of the North West quarter (¼) of the South West quarter (¼) and the South East quarter (¼) of the North West (¼) Quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the third principal Meridian, it being the strip of land over and across said above described tracts of land where the said railroad is now located."

In the court below, Kingwood Oil Company asserted claim to the strip of land conveyed by the Shanafelt deed (R. 3), but did not join in the appeal.

It seemed apparent that the contentions of the Magnolia Company and The Ohio Company would result in prolonged litigation, during which time the oil would be drained from under the right of way into nearby wells, thus resulting in a serious loss to the trust estate in the event Trustee's claim to title be upheld. Trustee therefore petitioned the bankruptcy court for an order permitting the oil to be removed from the right of way, the proceeds from the sale thereof, after defraying the expenses of drilling, conserving, and selling the oil, to be impounded as a trust fund for the account of whom concerned, pending final determination of the controversy.

Magnolia Petroleum Company and Ohio Oil Company entered their appearance, and the Bankruptcy Court, after hearing testimony respecting the probability of the oil being rapidly drained from under the right of way, found this to be a fact, and that it justified the immediate drilling of wells for the conservation of the oil (R. 53). The Court accordingly ordered that the proceeds of the oil so removed from the right of way be impounded; ordered other possible adverse claimants brought in by publication; and retained jurisdiction to hear further evidence and determine adverse claims to title (R. 54-56).

Magnolia Petroleum Company and Ohio Oil Company appealed from this *interlocutory decree* on the theory that the deeds upon which Trustee relied conveyed, by their granting clauses, a mere easement for railroad purposes, and that the Trustee therefore was in neither actual nor constructive possession of the underlying minerals.

The Court of Appeals sustained this contention and held that the Bankruptcy Court was without jurisdiction over the parties or subject matter of the litigation. The decree directed that they be dismissed for want of jurisdiction (R. 157).

Pending appeal from the interlocutory order, further proceedings, pursuant to the order of the bankruptcy court, were not stayed, and we go beyond the record to explain that as of September 1, 1939, thirteen oil wells had been drilled by petitioner on the right of way of Missouri-Illinois Railroad through the Salem oil field under the orders of the bankruptcy court here involved, and under similar orders respecting other segments not directly involved in this appeal. As of September 1, 1939, the money received from the sale of the oil and impounded in a special account awaiting directions of the Bankruptcy Court aggregated $472,000, of which, pursuant to orders of court, approxi-

mately $225,000 has been spent for drilling, producing and marketing the oil from these wells. We state these facts as a mere narrative of what has occurred since the appeal was taken.

In addition to the issues hereinbefore referred to, it was contended by the aforesaid oil companies in the lower court that Caroline Rusler was possessed of only a half interest in the land which she purported to convey to the Railroad Company by the deed hereinabove referred to, and petitioner in turn contended that any defect in this respect was cured by facts admitted in the Record (R. 135-6), which, according to petitioner's contention, gave him title by adverse possession pursuant to the provisions of *Chap.* 83, *Sec.* 6, *Revised Statutes of Illinois* 1939. Since the conclusion reached by the Court of Appeals did not make it necessary for it to pass upon this issue, we assume that this issue is not now properly before this court for consideration, and that if its determination becomes pertinent further proceedings on this particular issue will be had in the court below.

SPECIFICATION OF ERRORS.

I.

(a) The court erred in holding that an Illinois deed conveying to a railroad company *a strip of land for right of way* conveyed a mere easement, and erred in failing to hold that the language *"for right of way"* was merely descriptive of the intended use and not a limitation, restriction or condition respecting the duration or the use. The decision appealed from is in this respect in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in *Carter Oil Co. v. Welker,* decided November 6, 1939, and printed in the appendix of this brief. The decision under review is, in this respect, also in conflict with the authoritative Illinois decisions, and more particularly with such cases as *Weihe v. Lorenz,* 254 Ill. 195, 98 N. E. 268; *Tinker v. Forbes,* 136 Ill. 221, 26 N. E. 503; *Downen v. Rayburn,* 214 Ill. 342, 73 N. E. 634; *Noyes v. St. L. A. & T. H. R. R. Co.,* 21 N. E. 487, and *Supervisors of Warren County v. Patterson,* 56 Ill. 111.

(b) The court erred in construing the words *"over and across"* as referring to the words *"a strip of land,"* and erred in construing these words as indicating a reservation by the grantor of the subsurface rights, including oil, gas and other minerals, and in this respect the decision under review is in direct conflict with the interpretation of a similar conveyance by the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen,* 5 Fed. [2] 160, 162.

II.

The court erred in failing to hold that the bankruptcy court had jurisdiction, as a preliminary inquiry, to determine the question of possession on which its jurisdiction to determine the ultimate merits of the controversy de-

pended; and erred in holding that the action of the Bankruptcy Court in conserving the oil and impounding the proceeds, pending ultimate determination on appeal of the question of possession, was an abuse of discretion; and in this respect the decision is in conflict with such decisions of this court as *Trauble-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426, 432.

ARGUMENT.

I.

In the light of the Illinois decisions, did these warranty deeds, which purported to convey "a strip of land for right of way of said Railroad Company over and across" a larger tract specifically described, convey a fee-simple title to the strip of land so described by its intended use for right-of-way purposes?

The District Court, sitting as a Court of Bankruptcy in the case at bar, upheld the fee-simple absolute title to the strip of land in question, and in doing so followed without written opinion the decision of the District Court for the Eastern District of Illinois handed down October 13, 1938, in *Carter Oil Co. v. Welker et al.*, 24 Fed. Supp. 753, involving a substantially similar question.

The deed in the Carter Oil Company case conveyed to the Railroad Company *"as and for its right of way a strip of land"* (24 Fed. Supp. 754), which is not to be distinguished from the conveyance in the case at bar of *"a strip of land for right of way"* (R. 3).

In the Carter Oil Co. case Judge Lindley, after an exhaustive analysis of the Illinois decisions, thus summarized his conclusions (24 Fed. Supp. 756):

> "The language of the conveyance before me includes, under the statutes of Illinois, all covenants of warranty and seizin included in a common-law deed of bargain and sale of certain specifically described land, with the additional words 'as and for its right-of-way.' This language is substantially the same as that of the court in Noyes v. St. Louis A. & T. H. R. Co., supra, where the words used were 'for a right-of-way,' and it was expressly stated that the land was to be used for general railroad purposes 'as

> may be necessary.' *It seems to me, therefore, the settled law in Illinois that a mere statement of the use to which it is expected the property will be devoted, is not sufficient to engraft upon the conveyance of the fee a condition, limitation or restriction.* The words here are not sufficiently apt, under the rule in Illinois, to create a limited grant." (Italics ours.)

Referring to Judge Lindley's decision in the Carter Oil Company case, Judge Thomas, speaking for the Circuit Court of Appeals in the Magnolia case here under review, said (106 Fed. [2] 227):

> "We are not unmindful that in construing a deed somewhat similar to the deeds involved in this case the District Court of Illinois, in *Carter Oil Company v. Welker*, 24 F. Supp. 753, reached the conclusion that the deed vested a fee simple title in the railroad company, and not an easement. While that decision commands great respect, in so far as it is inconsistent, if at all, with the views herein expressed, we are not inclined to follow it."

The *Carter Oil Co. case* referred to was affirmed, and the reasoning of Judge Lindley in that decision was followed by the Circuit Court of Appeals of the Seventh Circuit in the decision handed down November 6, 1939, hereinafter copied in the appendix of this brief.

The Court of Appeals for the Seventh Circuit, in referring to the decision of the Circuit Court of Appeals in the *Magnolia case* here sought to be reviewed, states:

> "The difficulty of the question is well illustrated by the fact that opposite conclusions were reached by the District Court in the case at bar (see *Carter Oil Co. v. Welker*, 24 F. Supp. 753) and the Court of Appeals for the Eighth Circuit in the *Magnolia case, supra*, both after very scholarly study of the issues

and the authorities upon precisely the same type of deed and both arising under the Illinois law. Since the opinions in both of those cases contain excellent analyses of the significant cases bearing on the subject as well as the applicable Illinois statutes, we deem it unnecessary to repeat that discussion here, and therefore refer to only a few of the cases.

"While the Illinois courts have not passed on the identical question involved, there are several cases to the effect that the recitation of the purpose of the conveyance does not limit the title conveyed. See *Supervisors v. Patterson*, 56 Ill. 111; *Tinker v. Forbes*, 136 Ill. 221; *Downen v. Rayburn*, 214 Ill. 342, all relied upon by the District Court. In these cases we find the conveyance of a lot or tract, 'for a courthouse and other county buildings,' 'also for the purpose of locating proper water wheel and races to draw water,' 'to be used as a church location,' all of which conveyances were held to transfer the fee simple interest, notwithstanding the recitation of purpose. The *Magnolia case* holds that these cases are not authority for the construction of the deed here involved for the reason that in those cases the question was whether a fee simple was conveyed or only a determinable fee, and that in such cases the courts do not look with favor upon conditions subsequent, hence will not construe words indicating purpose or use as restrictions. The situation is different, it holds, when the question is whether a fee is conveyed or only an easement, in which case words 'which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed.'

"We do not agree with this distinction."

* * * * * * *

"We conclude that, in the absence of a contrary decision by the Illinois courts, we prefer to follow the rule that a deed conveying a strip of land, even though the purpose be recited, is to be construed as conveying

> a fee simple interest in the grantee rather than an easement of use. We do not agree with appellant's contention that the words 'over and across' written in longhand in the deed limited the conveyance to an easement. We think the words 'over and across' refer only to the surveyed line by which the exact location of the land was to be determined. * * * Decree affirmed."

STATUTES AND APPLICABLE RULES OF CONSTRUCTION.

Among the powers granted to a Railroad Company by the laws of Illinois (*Ch.* 114, *Sec.* 20, *R. S.* 1939) are those—

> "To purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railroad, and the stations and other accommodations necessary to accomplish the object of its incorporation, and to convey the same when no longer required for the use of such railroad."

Discussing the right of a railroad to hold fee-simple title to its right of way in the State of Illinois, the Supreme Court of that state, in *Walker v. I. C. Railway Co.*, 215 Ill. 610, 74 N. E. 812, said:

> "There can be no question but that the Appellee, under its charter and the statute in force in this state at the time it received said deed, had the power to acquire a fee."

Section 9 of the *Illinois Conveyance Act* (*Ch.* 30, *Sec.* 8, R. S. 1939), which Act has been in effect since July 1, 1874, sets forth the form of warranty deed to be used in Illinois, and then follows the language:

> "Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a

conveyance in fee simple, to the grantee, his heirs or assigns."

The deeds in question followed this statutory form.

Words of inheritance are not necessary in Illinois by reason of the provisions of *Section* 13 of the *Conveyance Act* (*Ch.* 30, *Sec.* 12, *R. S.* 1939), which provides as follows:

> "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law."

It is the contention of opposing counsel that this statute last above quoted has to do merely with the *duration* and not with the *use* of the estate conveyed. The answer to this contention is here of no consequence, for entirely apart from the foregoing statute it is now the settled law in Illinois that with respect to *use* as well as *duration* of the estate, all reasonable doubts are to be resolved against conditions, limitations and restrictions, and are to be resolved in favor of the grantee as against the grantor.

In *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364, the court, citing and following precedents there set out, said:

> "It is also well settled that 'in the construction of deeds containing restrictions and prohibitions as to the *use* of the property by the grantee, all doubts should, as a general rule, be resolved in favor of the free use of the property, as against restrictions.'"

In *Williams v. Swango*, 365 Ill. 549, 7 N. E. (2) 306, the court said:

> "Where words are used in an instrument which

may be understood in one way by some and in another way by others, so that a doubt of their intended meaning arises, such doubt must be resolved in favor of the grantee and against the grantor."

From the foregoing statutes and decisions the following conclusions are undisputed:

A railroad company may, by conveyance in Illinois, acquire fee-simple absolute title to a strip of land for its right of way.

The conveyance of "*a right of way*" as distinguished from "*a strip of land for right of way*" does not pass fee-simple absolute title, but only an easement for railroad purposes.

If the use or the duration of the conveyance does not clearly appear from the four corners of the deed, all doubts must be resolved against limitations of use or duration and in favor of an absolute fee-simple title.

THREE POSSIBLE CONSTRUCTIONS.

There are three possible constructions of the deeds in question which purport to convey "*a strip of land for right of way,*" to wit:

(a) The language may be construed as conveying fee-simple absolute title, the words "for right of way" being merely descriptive of the use and not a limitation of either the duration or the use.

(b) The language may be interpreted as passing a base, qualified or determinable fee—in other words, a fee that terminates upon discontinuance of the use for railroad right of way.

(c) The language, according to the contention of respondents, may convey a mere easement or right to use

the land exclusively for a right of way, the fee remaining in the grantor.

We shall consider these in the order mentioned.

CONSTRUING THE CONVEYANCE AS A FEE-SIMPLE ABSOLUTE.

Petitioner most earnestly contends that under the authoritative Illinois decisions the language *"for right of way"* following the language *"a strip of land"* is merely descriptive of the use and not a limitation or condition, and that the deeds in question therefore passed fee-simple absolute title to the strip of land in question.

In expressing its ultimate conclusion on this issue the Court of Appeals in its opinion says (106 F. [2] 225):

> "An examination of the deeds under consideration, *with the Illinois law and rules of construction in mind,* is, we think, convincing that in each of them the clear intent, expressly stated, was to convey to the Railroad Company only a right-of-way easement for its railroad, and not a fee."

The fallacy of this conclusion is that the Court of Appeals did not keep *"the Illinois law and rules of construction in mind,"* or at least did not apply these rules or give them the weight that is required by the decisions of this Court with respect to matters where the state decisions are controlling. Under the authoritative Illinois decisions it is well settled that in the construction of deeds all doubt should be resolved in favor of the grantee and in favor of the free use of the property as against conditions, restrictions and limitations. Following these principles the Supreme Court of Illinois, as admitted in the opinion under consideration (106 F. [2] 225) has held that the descriptive phrases hereinafter referred to are not limitations or conditions imposed upon the fee, to wit:

(a) Conveyance of a strip 10 feet wide *"for alley purposes"* (*Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268).

(b) The granting of a lot *"for the purpose of locating a proper water wheel and races to draw said water"* (*Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503).

(c) Conveyance of a certain tract or parcel of land *"to be used as a church location"* (*Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364).

(d) Conveyance of a tract of land to a railroad company *"for the erection and maintenance thereon of the freight house of said companies, or either of them, together with said tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company"* (*Noyes v. St. L., A. & T. H. R. R. Co.*, 21 N. E. 487).

We shall analyze these and other applicable Illinois decisions in some detail.

In *Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268, conveyance was of a definite tract of land, together with ten feet adjoining on the south of said tract for alley purposes. The language of the conveyance in question from Huegely to Altmansberger was:

> "I also give ten feet wide adjoining on the south of this tract, or the strip between this tract and the alley I gave in my deed of September 3, 1881, to John Lorenz, for alley purposes."

Discussing this, the court said:

> "The deed conveyed the fee to Altmansberger. Even if the words 'for alley purposes' refer to the conveyance to Altmansberger and not to that of Lorenz, they do not limit the estate granted."

In the case just cited, the deed conveyed a strip of

ground ten feet wide *"for alley purposes."* In the case at bar, the deeds conveyed a strip of ground sixty feet wide *for right-of-way purposes.* If the language *"for alley purposes"* in the case referred to did not limit the estate granted, then the words *"for right of way"* in the case at bar do not limit the estate granted. If this language does not limit the estate granted, then, obviously, the estate granted is an unrestricted fee-simple title to the strip of land in question.

In *Tinker v. Forbes,* 136 Ill. 221, 26 N. E. 503, the court had under consideration a deed which granted the east half of Lot 9 *"for the purpose of locating a proper water wheel and races to draw said water."* In holding that this description of the intended use of the lot so conveyed did not amount to a condition or covenant the court said (26 N. E. 506 l. c.):

> "That deed granted a certain interest in the grantor's water-power on Rock river, and also conveyed to the grantees lots 12 and 13 in the west block of the grantor's lots, 'and also, for the purpose of locating proper water wheel and races to draw said water, the east half of lot 9 in the south block,' etc. It cannot be doubted that the effect of this deed was to convey to the grantees the fee in said half lot. By reference to the operative words of the deed it will be seen that by it the grantor granted, bargained, sold, and conveyed, for the purpose above indicated, the south half of said lot 9, the title or interest, thus sought to be conveyed being, not an easement or servitude, but the lot itself. *What effect, then, is to be given to the words, 'for the purpose of locating proper water wheel and races to draw said water'? It is plain that they do not constitute a condition, as there is no provision for re-entry for condition broken, nor is there anything in the instrument indicating an intention on the part of the grantor that the appropriation of said premises to any other purpose should have the effect*

of defeating the estate granted. Nor can said language be construed as a covenant on the part of the grantees to use the property granted for the purpose indicated, and none other. No terms are used by which a covenant is ordinarily expressed, nor are there any negative words forbidding the appropriation of the property to other purposes." (Italics ours.)

In *Downen v. Rayburn,* 214 Ill. 342, 73 N. E. 634, which is representative of the cases cited, the Court had under consideration a warranty deed from Downen and wife to certain church trustees conveying

"A certain tract of land *to be used as a church location,* situated * * *."

The rules of interpretation applicable to this language would seem equally applicable to the conveyance of

"A certain tract or parcel of land *to be used as a railroad right of way,* situated * * *."

Quoting from the Illinois decision last referred to:

"It is well settled that where real property is conveyed in fee restrictions in the use are not favored, although courts will enforce such restrictions where the intention of the parties is clear in the creation of restrictions or limitations upon the use of a grant. It is also well settled that 'in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee *all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions.*' * * * It will be noticed that the words in question, 'to be used as a church location,' stand alone, and that the words 'upon condition' are not used in connection therewith. That is to say, it is not stated in the deed that the premises are conveyed upon condition that they are to be used as a church location. Nor is there any

provision in the deed for re-entry by the grantor in case of a breach of the covenant, if it be a covenant, that the premises are to used as a church location. * * *

"Here the words in question, 'to be used as a church location,' are merely declaratory of 'the purpose of the conveyance.' It cannot be said, therefore, that they render the estate conditional."

In *Noyes v. St. Louis A. & T. H. R. R. Co.*, 21 N. E. 487, the Supreme Court of Illinois had under consideration a deed granting to the Railroad Company a strip of land 4,000 feet long and 350 feet wide. Following the granting clause, the deed recited:

"The above tract is granted to said companies for the erection and maintenance thereon of the freight-house of said companies, or either of them, together with side tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company."

Referring to this language the court said:—

"If there are any conditions subsequent imposed by this deed, they must arise by implication from the use of the words 'showing the purpose and object of the grant' * * *.

"It is to be observed that the clause quoted does not require, either expressly or by necessary implication, that the company shall or must do anything. No condition is attached to their failure to do any act at any time. The language employed would indicate, rather, the use to which the land may be devoted. The land is conveyed to them for the purposes set forth in the deed. * * *

"As we have seen, the courts are not inclined to so construe the contract of parties as to make estates liable to be defeated by conditions subsequent, and, even if such an estate is created, the court will not

> defeat it except for a substantial failure to perform the condition. 'In the same spirit, and in the same line of policy, courts construe a clause in a deed to be a covenant, rather than as a condition subsequent . . . . We are not inclined to hold that the deed vested the title in the grantees upon condition to be subsequently performed."

In *Supervisors of Warren County v. Patterson*, 56 Ill. 111, by contract and by subsequent deed executed pursuant thereto, one party "agrees to sell to said party of the second part" certain described property "*for courthouse and other county buildings.*" In the course of its opinion the court said:

> "If A buys a lot of ground of B, and it is declared in the deed that he purchases it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention. But if a grant be made by A to B, *on condition* B erects on the land granted a certain structure, and he fails so to do, the land might revert to the grantor."

The court in the case cited commented that the deed conveyed the absolute fee, and that the statement of the intended use was not sufficient to constitute a conditional grant. By analogy, the conveyance of a strip of land for right-of-way purposes does not by such designated intention of the use limit the fee to the strip of land so conveyed.

The above cases have been consistently followed by the Supreme Court of Illinois in *Chicago Daily News v. Kohler*, 360 Ill. 351, 196 N. E. 445, and finally in *Rockford Trust Co. v. Moon*, 370 Ill. 250, 18 N. E. [2] 447, wherein the court said:

> "Even where the deed contains words stating the

consideration for or the purpose of the conveyance, they do not, of themselves, render an estate conditional. *Downen v. Rayburn,* 214 Ill. 342, and cases there cited."

If the decision of the Court of Appeals below is correct, then it would follow as a logical corollary that the Supreme Court of Illinois should have held that conveyance of a ten-foot strip *"for alley purposes"* conveyed merely an easement for alley purposes, and should have held that the conveyance of a parcel of land *"to be used as a church location"* conveyed a mere easement for this particular purpose, reserving all other rights in the original grantors. But the Supreme Court of Illinois in these and other analogous instances refused to so hold. It must therefore be assumed that following these precedents the Supreme Court of Illinois, to be consistent, would now hold that the conveyance of a *"strip of land for railroad right of way"* is not a conveyance of a mere easement. In the case at bar the Court of Appeals, we respectfully submit, erred in failing to follow these Illinois authorities to their logical conclusion.

Construing the Conveyance as a Base or Determinable Fee.

If the language *"for right of way"* be construed as a condition or limitation, then the conveyance would not necessarily be an easement, but rather a base, qualified or determinable fee. Discussing such a base or determinable fee in *McIntyre v. Dietrich,* 294 Ill. 126, 128 N. E. 321, 322, the court said:

> "A base or determinable fee is such a fee as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. It is a fee for the reason that it may last

forever if the contingency does not happen, but it is debased because its duration depends upon collateral circumstances which qualify or debase it."

This court, in passing upon a similar question in *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, said:

"The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, *but a limited fee*, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

This same language was quoted with approval in *Kern River Co. v. United States*, 257 U. S. 147, 151.

This court, in *Western Union v. Penn. R. Co.*, 195 U. S. 540, 570, said:

"A railroad right of way is a very substantial thing. *It is more than a mere right of passage.* It is more than an easement. * * * A railroad right of way has therefore the substantiality of the fee, and is private property, even to the public, in all else but the interest and benefit in its uses."

In *Chicago & Mississippi River R. R. Co. v. Patchin*, 16 Ill. 198, 202, the Court said:

"I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public in a highway, leaving the fee in the owner of the soil, but is an absolute ownership in the fee *for railroad purposes.*"

If the conveyance be considered as a base or determinable fee, then the fee in the land passed to the Railroad Company with a mere *possibility of reverter* upon

termination of the use for railroad purposes. Such a situation was before the court in *Dees v. Cheuvronts*, 240 Ill. 486, 88 N. E. 1011. In that case the land was conveyed to school trustees "so long as it shall be used as a schoolhouse site." The Supreme Court of Illinois held that the school trustees, rather than the grantor with mere possibility of reverter, was entitled to drill for the oil underlying the property. This case still stands as the law in Illinois, and applying it to the facts at bar, the Railroad Company's Trustee would be entitled to the oil underlying the right of way, even though it be conceded that the language "for right of way" constituted a limitation of the fee.

CONSTRUING THE CONVEYANCE AS AN EASEMENT.

Under the Illinois law a conveyance of a mere *right of way*, as distinguished from *a strip of land for right of way*, conveys the mere *use* of the land. The conveyance of *a right of way* is the conveyance of an easement, whereas the conveyance of *a strip of land, to be used exclusively for right-of-way purposes*, is a base or determinable fee with possibility of reverter. We have found no Illinois decision to the effect that the conveyance of the fee subject to its use exclusively for railroad right of way conveys a mere *use* of the land. On the other hand, the Illinois decisions uniformly hold that the conveyance of a mere *right of way* does not convey the fee at all, but merely the *use*. Quite obviously, therefore, the cases dealing with deeds which purport to convey a mere *right of way* or *use* are not applicable to the deeds in question. It is upon the Illinois decisions of this kind that opposing counsel rely. A brief analysis of these cases will readily distinguish them from the facts at bar.

In *I. C. R. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301, the conveyance was

"For the purpose of constructing, maintaining, and operating thereon a single or double track railroad, with all its necessary appurtenances and for all uses and purposes connected with the construction, repair, maintenance, and complete operation of said railroad, *the right of way* over and through said tract * * *." (Italics ours.)

As will be noted from the foregoing quotation, the granting clause of the deed referred to conveyed a mere "*right of way*," and was therefore held to convey an easement.

In *I. C. R. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563, the court had under consideration another conveyance to the Illinois Central on the same form and in exactly the same language as the conveyance last above quoted, and it was admitted in the stipulation of facts that it conveyed a mere easement.

In *Walker v. I. C. R. R. Co.*, 215 Ill. 610, 74 N. E. 812, the conveyance was on the same form and in exactly the same language as that above quoted from the *Houghton case*. The conveyance was of *a right of way* and not a strip of land for use as a right of way.

In the *Walker case* the court, apropos of our contention, said:

"The general rule is that words following the granting clause of a deed which state the use to which the property granted is to be put, are not restrictions or limitations upon its use unless it is specifically so stated to be in the deed."

In *Branch v. Central Trust Co.*, 320 Ill. 432, 151 N. E. 284, the conveyance was:

"A railroad right of way and depot grounds over and upon the whole of Lot A * * *."

Lot A referred to was a narrow strip of ground extending through the half quarter section about sixty-six feet in width except at the east end, where it was 160 feet wide. The court in construing the foregoing granting clause said:

> "The grant to a railroad company of *a right of way* over, through, and upon land described does not convey the fee to any part of the land described, but only the right to use the land for railroad right-of-way purposes." (Italics ours.)

After referring at length to the decision of other states, the court said:

> "The grant is of *the railroad right of way and depot grounds,* to have and to hold unto the grantee for as long as the same shall be used for railroad right of way and depot grounds. Upon the abandonment of the use of the right of way for a railroad right of way and depot grounds, the interest of the railroad company terminated." (Italics ours.)

In *Joseph v. Evans,* 338 Ill. 11, 170 N. E. 10, plaintiff offered verbal testimony in support of an alleged agreement to execute a deed. The evidence merely tended to show that a "*right of way*" was to be conveyed. The railroad had been abandoned, and if only a right of way was to have been conveyed, this right was lost by abandonment. The court said:

> "The law in this state is well settled that a *grant of a right of way* to a railroad company does not convey a fee in the land, but conveys an easement only." (Italics ours.)

In *Wiggins Ferry Co. v. O. & M. Ry. Co.,* 94 Ill. 83-92, the Ferry Company purported by the language of the deed to give, grant, and convey to the Railway Company

> "The right to construct, maintain and use, in, through,

upon and over the piece or parcel of ground hereinafter described, all such railroad tracks, depots, warehouses, and other buildings and erections as the said party of the second part shall find to be necessary or convenient to be constructed, maintained or used for the purpose of transacting the business of the said party of the second part. * * *"

It was held that the instrument clearly conveyed no land, but merely a right to the use which would be terminated when its use for the purpose ceased.

In *Carter Oil Co. v. Welker*, 24 Fed. Supp. 753, 757, Judge Lindley, after analyzing the foregoing six cases on which opposing counsel rely, said:

"In each of these cases the language used by the parties was such that the court found as a necessary implication an intention to convey a limited and restricted right in spite of the general rule in Illinois that limitations are not favored. * * *

"Proper constructon of each of these cases does not indicate any conflict in principle between them and the cases relied upon in support of my conclusions. They indicate rather an adherence to those principles and the existence in Illinois of the rules herein previously announced, namely; that in the absence of words necessarily forcing a conclusion that a limited fee is intended, a fee-simple title passes."

But even if the conveyances in question be considered as mere easements, such "incorporeal and intangible rights in or growing out of land have applied to them the same idea of duration or quantity of estate that is applied to corporeal hereditaments."

Oswold v. Wolf, 129 Ill. 542, 19 N. E. 28, 30;
Wiggins-Ferry Co. v. Ohio & M. Ry. Co., 94 Ill. 83;
C. C. C. & St. L. Ry. Co. v. Munsell, 94 Ill. App. 10, 12.

In *Walker v. Illinois Central*, 215 Ill. 610, 74 N. E. 812, 814, the court had under consideration a deed which conveyed a mere right of way, and while holding this to be an easement, the court said:

> "The general rule is that words following the granting clause of a deed, which state the use to which the property granted is to be put, are not restrictions or limitations upon its use, unless it is specifically so stated to be in the deed. *Board of Supervisors of Warren County v. Patterson*, 56 Ill. 111; *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364. The rule above announced is usually held to apply only where a fee has been conveyed. *Still, in a case like this, where the use of the strip has been conveyed for railroad right of way purposes, and its exclusive possession is necessarily to be vested in the railroad company to fulfill the object of the grant so long as it shall be used for railroad right of way purposes, we are of the opinion no reason exists why such rule should not be applied to such conveyance.*"

This statement last above quoted is opposed to the conclusions of the Circuit Court of Appeals in the case at bar. In fact, the Supreme Court of Illinois in the Walker case just cited has gone even further than is necessary in the case at bar, and has held that where the conveyance is admittedly a mere right-of-way easement, the court will nevertheless apply the same rules of construction to such an appurtenant easement as would be applicable to the conveyance of any interest in land.

Conclusions to Be Drawn From the Foregoing.

In the case at bar the question at issue is really not what rules of construction are applicable to railroad easements, but rather what rules of construction are applicable to a deed in statutory form which purports to con-

vey either the fee-simple absolute title or else a base fee with possibility of reverter. In determining whether the deeds in question convey a fee-simple absolute or a fee subject to limitations as to duration and use, we must first turn to the authoritative Illinois decisions to decide whether the language is considered sufficiently ambiguous to justify application of rules of construction, and, finding this to be true, we must then apply the authoritative Illinois decisions to which we have referred, resolving the doubt in favor of the grantee and in favor of the fee-simple absolute conveyance. There is nothing in any of the decisions cited to the effect that the conveyance of the *fee*, even if specifically restricted to *use for right of way only*, would convey a mere *easement* or *right of use* as distinguished from a limited fee.

It may be true, as stated in *Waller v. Hilderbrecht*, 295 Ill. 116, 128 N. E. 807, 809, that,

> "Generally speaking, where a particular or special right of easement in land is conveyed, which may well coexist and be enjoined and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed."

In the case referred to, this language was used in connection with an easement in gross—one that was not even appurtenant to real estate.

In the deeds conveying *mere rights of way*, on which opposing counsel rely, the court repeatedly has stated that the fee remains in the grantor. Analyzing the deeds in the case at bar in the light of the Illinois decisions and the provisions of the *Illinois Conveyance Act*, it is difficult to understand how warranty deeds in statutory form purporting to convey a strip of land can be considered as reserving the fee in the grantor, even though the words

"for right of way" be held to limit the duration or use for railroad purposes, thereby making the fee a base or determinable fee with possibility of reverter.

If the principle announced in the foregoing quotation from *Waller v. Hilderbrecht* has any application at all to the facts at bar (which we deny), it can be invoked only after first establishing that the conveyance would otherwise be a base fee conditioned on use for railroad right of way, and then reasoning that since an easement will accomplish the same purpose as such a base fee, the conveyance should, in the light of the above quotation, be treated as an easement. This reasoning presupposes that the conveyance would otherwise be a fee limited to use for railroad right of way—it starts with this supposition as a premise. But what about the first step in the chain of reasoning—the step by which it is to be determined that the conveyance is not a fee-simple absolute, but rather a conditional or base fee for which the easement theory is then to be substituted? The cases above cited, such as *Downen v. Rayburn*, dealing with a tract of land "*to be used as a church location*," and *Weihe v. Lorenz*, dealing with a strip of land "*for alley purposes*" block any such contention. Unless they can be reasoned away, the conveyance never gets to the stage of being a limited fee, but remains a fee absolute, and therefore it cannot be reasoned that the conveyance is an easement, because an easement will certainly not serve the same purpose as a fee absolute.

To invoke the principle announced in the quotation *supra* from *Waller v. Hilderbrecht*, if applicable at all, respondents must first establish that, in the conveyance of "a strip of land for right of way," the words "for right of way" constitute a limitation of the fee, both as to use and duration, rather than a mere description of the intended

use. Such a showing cannot be made in the face of the decisions cited on page 16 *et seq.* of this brief.

As forecast above, however, we do not concede that an easement affords substantially the same right as would be accorded by a base fee conditioned on use for railroad right of way, if for no other reason than because this latter conveyance would give grantee the oil and mineral rights pending the contingency upon which possibility of reverter depends, while an easement would accord the mere right of limited use without the right of profit from the minerals.

Much was said below about the injustice of retaining title to strips or gores across farm lands after use for railroad purposes has ceased. The grantor in this respect would have the same right of reverter in the case of a base fee as he would have in the case of an easement. In either event, he would have title when use for railroad right of way ceased, so as between base fees and easements this question of alleged public policy is not a factor.

Conveyances reserving a passage or right of way are to be distinguished from the facts at bar in applying the Illinois rules of construction. For example, if A conveys to B a strip of land for an alley, the presumption is in favor of the grantee and in favor of the unrestricted use. On the other hand, if A conveys to B a city lot with reservation of a strip of said land for an alley, the presumptions are still in favor of B as grantee and in favor of the fee-absolute construction of the conveyance to B. Quite obviously the same principles of construction will work opposite results, depending upon whether the strip for an alley is conveyed or whether it is reserved from a larger tract so conveyed.

Illustrative of this class of cases is *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482, cited by opposing counsel in the court below, involving a reservation of "a strip 2 rods wide off the northwest side of said premises for a street." Quoting

from the Minnesota decision on which the Illinois court relied:

> "* * * and, upon the principle that the grantor's deed is to be taken most strongly against himself, no such exclusion of the fee is to be implied."

A different rule is applied to an *exception* of a strip of land from the conveyance as distinguished from a *reservation* of the strip for a right of way (*Dickman v. Madison County L. & P. Co.*, 304 Ill. 470, 136 N. E. 790, 794).

Since the law of Illinois relating to construction of deeds is controlling, we have for the most part confined the foregoing discussion to the Illinois decisions. The decisions of other states are conflicting and are frequently prompted by statutory provisions. This is particularly true in Kansas. In Missouri the earlier decisions to the effect that the carrier could not acquire the fee in its right of way have been overruled in the case of *Coates & Hopkins Realty Co. v. Kansas City Terminal*, 328 Mo. 1118, 43 S. W. [2] 817, 823.

Use of the Words "Over and Across"

In each of the deeds under consideration appear the words "*over and across*," with respect to which language the Court of Appeals in its decision under review says (106 Fed. [2] 224-5):

> "Counsel for appellee argue that the words 'over and across,' as used in the deeds, are descriptive of the words 'right of way,' and the words 'right of way' are descriptive of location by reference to the intended use of the 'strip of ground' to be conveyed. In this we think they err. The words 'over and across' are descriptive of the location of the 'strip of ground,' and the words 'for right of way' describe the use or easement, that is, the estate intended to be conveyed. No

other view can be reconciled with the language of the Rusler deed where there is added to the description the words, 'it being the strip of land over and across said above described tracts of land where the said Railroad is now located.' The Rusler deed was executed in 1898 and the other two in 1896. Apparently the railroad had not been located when the earlier deeds were made, but we perceive no sound reason why they should be construed differently."

In the *Young* deed (R. 3) involved in claim of Magnolia Company (R. 58) appears *"a strip of land for right of way for said Railroad Company 60 ft. wide over and across the Southwest Quarter. * * *"*

In the *Bower* deed (R. 3) involved in the claim of the Ohio Company (R. 68) appears *"a strip of ground sixty-six (66) feet wide for right of way of said Railroad Company over and across the East Half * * *."*

In the *Rusler* deed (R. 3) involved in claim of the Ohio Company (R. 68) appears *"a strip of ground for right of way of said company sixty (60) feet wide over and across the Southeast Quarter * * *, it being the strip of land over and across said above described tracts of land where the said railroad is now located."*

Analyzing the foregoing phrases from the Young and the Bower deeds, and the first clause in the Rusler deed, an ambiguity is obviously apparent. Do the words *"over and across"* modify *"a strip of land,"* or do they modify the words *"right of way"*? Either interpretation might be justified from a literal construction of the language.

Under the circumstances, if one interpretation results in limiting the fee and the other does not, then under the established rules of construction prevailing in Illinois and heretofore discussed in this brief, we must adopt the interpretation most favorable to the grantee and must

avoid the construction that will limit the fee-simple absolute title.

Judge Thomas, speaking for the Court of Appeals in the case at bar, predicates his conclusion above quoted solely upon the following additional phrase appearing exclusively in the Rüsler deed, to-wit:

> "* * * it being the strip of land over and across said above-described tracts of land where the said railroad is now located."

The Court of Appeals in the opinion under review apparently reasons that the strip of land referred to is over something, and that it was therefore not the intention to convey the subsoil and mineral rights. If this be the conclusion the Court of Appeals has sought to convey, then it is in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen*, 5 Fed. [2] 160, 162, wherein the Court said:

> "Plaintiff's whole case is built upon the use of the one word 'over.' It is argued that the use of that word demonstrates that there was something 'under' which was not being conveyed, and which later turned out to be oil. In our opinion, 'over' is synonymous with 'through' and 'through and over' conveys no meaning different from what would have been expressed if the words 'and over' had been left out."

A like question was before the Supreme Court of Texas in *Brightwell v. I. & G. N. Ry. Co.*, 49 S. W. [2] 437, 440, from which opinion we quote:

> "Counsel for Brightwell et al. earnestly insist that because this deed uses the word '*over*' in describing the thing conveyed, an intent is evidenced to convey only an easement. In other words, it is contended that the title *to* land is not conveyed, but merely a right *over* land. We think this contention should be overruled. The identical word is used in

> the deed construed in the Calcasieu Case. That deed says: 'Have granted * * * and by these presents do grant, bargain * * * to Houston and Texas Central Railroad Company, a strip of two hundred feet of land over the tracts of land,' etc. As before shown, the deed was held to convey the fee. The word *'over'* may sometimes mean *'above,'* and in other instances it may mean the *outside of*, but in this instance it clearly means from one side or extremity of grantor's land to the other."

Again bearing in mind that the doubt must be resolved in favor of the grantee and in favor of the unrestricted fee, it seems apparent that the lower court's interpretation of the last above quoted phrase from the Rusler deed is unwarranted.

In any event, this language peculiar to the Rusler deed could not have any bearing upon the interpretation of the Young and Bower deeds which were executed about two years before the Rusler deed and contained no such language as is found in this last phrase of the Rusler deed upon which the Court of Appeals predicates its conclusions.

II.

Even if it be ultimately held that Debtor's Trustee has a mere easement for railroad purposes, and that he had neither actual nor constructive possession of the oil underlying the right of way, yet the Bankruptcy Court had jurisdiction to determine the question of possession, and pending the determination, had jurisdiction to conserve the oil, permitting the cost thereof to be paid out of the proceeds of the sale, and holding the remainder of the proceeds for the account of whom concerned. The action of the court in this respect was not an abuse of discretion.

The Court of Appeals, disposing of this issue, said (106 Fed. [2] 228):

"Counsel for appellee in their briefs argue that even conceding that the court was without jurisdiction to determine title to the mineral and oil rights because the trustee was not in actual or constructive possession, that part of the order appointing a receiver *pendente lite* with authority to take possession, drill wells and extract and sell the oil was not an abuse of discretion. It cannot be said that the appointment of a receiver under such circumstances is not erroneous, nor that if he takes possession from the owner under such a void appointment that his act is not wrongful. * * * We hold that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the mineral, oil and gas rights underlying the railroad right of way over and across the three tracts of land described in the deeds relied upon; that, consequently, the court was without jurisdiction to make the order appealed from; and that the order was wholly void."

The jurisdiction of the bankruptcy court with respect to a controversy of this nature is thus stated by this court in *Central Republic Bank & Trust Co. v. Caldwell*, 58 Fed. (2) 721, 730:

"First, the bankruptcy court always has jurisdiction, as a preliminary inquiry, to determine its own jurisdiction to proceed to examine and decide, in a summary proceeding, the merits of an adverse claim; second, the bankruptcy court has jurisdiction to examine and decide adverse claims if it has possession of the disputed property."

In *Taubel-Scott-Kitzmiller Co., Inc., v. Fox et al., Trustees*, 264 U. S. 426, 432, the Supreme Court said:

"As every court must have power to determine in the first instance whether it has jurisdiction to proceed, the bankruptcy court, has in every case, jurisdiction to determine whether it has possession, actual

or constructive. It may conclude, where if lacks actual possession, that the physical possession held by some other person is of such a nature that the property is constructively within the possession of the court."

If this court holds that Trustee has the fee simple title to the strip of land on which the right of way in question is located, then this present discussion in subdivision "II" of this brief becomes a moot question. If, however, this court decides that Trustee's title is but an easement, and that Trustee is therefore not in actual or constructive possession of the oil underlying the right of way, then we must not lose sight of the fact that the court nevertheless had jurisdiction to determine Trustee's possession and had jurisdiction to make appropriate orders to conserve the estate pending an appeal from its order upholding its jurisdiction.

The court below specifically found (R. 53):

"(b) That immediate action is necessary to conserve the oil supply underlying said property for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court;

"(c) That this Court has authority to direct that the expenses thereof be borne, in so far as possible, out of the proceeds of the oil so received."

There is ample evidence in the record justifying this finding that immediate action was necessary to conserve the oil supply and prevent its dissipation through adjacent wells pending the litigation. No assignment of error was urged against this ruling of the court. We therefore start with the premise that failure to have authorized the drilling of the wells on the right of way would have resulted in much of the oil being drained from under the right of way, to the great prejudice of the trust estate in the event

Trustee's claim to title be upheld. We respectfully submit that the technical jurisdiction of the court pending determination of possession was sufficient to legally justify the interlocutory order in question, and that the execution of such an order for the conservation of the estate was the exercise of sound discretion, and is not reviewable under any of the assignments of error set forth in Appellee's brief.

We naturally turn to the State of Texas, which is a large oil producing territory, for applicable decisions.

In *Malone v. Barnett*, 87 S. W. (2) 523, the *Civil Court of Appeals of Texas*, in a decision handed down October 30, 1935, appointed a receiver to remove and market the oil to which adverse claims were being asserted. Quoting from the opinion:

> "It seems now to be the settled law of this state that a receiver may be appointed by a court of competent jurisdiction upon the application of a joint owner of an oil and gas leasehold estate covering oil-producing land and thereby prevent drainage which may result when the joint owners are unable to agree upon a plan of development or operation of such lease. * * * The contention is made by appellants that no facts are alleged showing the immediate necessity of the appointment of a receiver without notice to them. There are allegations in the petition that the oil under the land involved is being constantly drained by wells on two sides of the tract of land involved, and that such drainage will create drainage ditches or feeders to said wells on adjoining leases and thus materially damage the leasehold estate of plaintiff's and defendants' tract of land. These allegations, it is believed, are sufficient to justify the court in making the appointment of a receiver without notice to appellants."

Exhaustive discussions of this question will be found in *Chancellor v. Guerra*, 85 S. W. (2) 663 (Texas); *United North & South Oil Co. v. Meredith*, 258 S. W. 550 (Texas); *Ohio Fuel Oil Co. v. Burdett*, 72 W. Va. 803, 79 S. E. 667 (W. Va.).

In *State of Oklahoma v. State of Texas*, 252 U. S. 372, a proceeding was filed in the Supreme Court of the United States which involved oil rights underlying the Red River. The United States intervened and requested the appointment of a receiver. The order of the Supreme Court directing the Receiver is set out in 253 U. S. 465, from which we quote:

> "The Receiver is hereby further authorized and directed to drill in the river-bed area described in paragraph 3 hereof, and bring into production whatever new wells he may be advised by his geologist and other experts are necessary for the conservation and development of the river-bed lands as a whole, pay the cost thereof out of the funds in his hands derived from the production of the wells in said river-bed area, keep separate accounts of the costs of drilling and operating and of the proceeds of the production of each well, and make a full report thereof, with his recommendations for the equitable allocation and distribution of such costs and proceeds, as soon after the court reconvenes in October next as may be practicable.
>
> "In addition to the specific powers herein contained, the Receiver, until the further order of this court, is hereby given whatever additional administrative powers may be found to be necessary to properly protect, operate, manage and develop the property within the receivership area and the oil and gas deposits therein."

In *Irving Trust Co. v. Wieser Products Corporation*, 71 Fed. (2) 681 (C. C. A. 2), the receiver of the bankrupt

moved the District Court to compel an affiliated company to turn over the assets in its possession, which he claimed in behalf of the trust estate. The judge heard the application upon the receiver's petition, supported by affidavit of an accountant and an answering affidavit, and directed the respondent to turn over the property to the receiver. This was reversed upon appeal, but the appellate court held that, pending determination of the jurisdictional question by the lower court and pending appeal, it was proper for the court "to impound the property so as to secure it, should the case go against the respondent in the end. That was a preliminary remedy like an injunction, quite independent of the final disposition."

Oil is of a wandering and vagrant nature; likely to be lost pending the litigation unless drawn to the surface.

Quoting from *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46, 48:

> "Oil and gas are classed as minerals, and that term is not confined to metallic substances, *but, on account of the wandering and vagrant nature of oil and gas and their liability to escape or to be withdrawn to other lands*, they are not subject to absolute ownership. They belong to the owner of the land under which they are located so long as they remain there, but when they escape and go under other land the title of the former owner is lost. The grant of oil and gas is a grant of such oil and gas as the grantee may find, and he is not vested with any estate in the oil or gas until it is actually found." (Italics ours.)

In the light of the foregoing decisions, we respectfully submit that even though the challenge to Trustee's possession of the oil rights underlying the right of way be sustained, the fact remains that the lower court had jurisdiction, pending determination of this issue respecting possession, to enter an appropriate order conserving the

subject matter of the litigation. The interlocutory order appealed from was not an abuse of discretion in this respect and, therefore, should not be disturbed. Under this ruling, the proceeds from the sale of the oil which the Trustee has removed from the right of way would first be applied toward the expense of drilling the wells and conserving and selling the oil, and the balance, if any, would be turned over by Trustee to the party whose title is sustained. If Appellants are entitled to the oil and the proceeds from the sale of their oil has been used to defray the cost of drilling, it goes without saying that they should be permitted to continue to use any wells on the right of way that have been paid for out of the proceeds of their oil. We are confident that the lower court will protect their rights in this respect.

CONCLUSION.

In the light of the Illinois decisions which are here controlling, we most earnestly urge this court to hold that the warranty deeds in question, which purported to convey "a strip of ground for right of way of said Railroad Company over and across" the larger tract specifically described, conveyed the fee simple absolute title to the strip so described by its intended use for right-of-way purposes.

If this court, however, should reach a different conclusion, then we urge that the jurisdiction of the lower court be upheld with respect to its right to enter the interlocutory decree in question for the purpose of preserving the subject matter of the litigation pending appeal, and that said interlocutory decree, to the extent that it authorized the cost of drilling the wells to be paid out of the proceeds

of the oil, be held not to have been an abuse of discretion on the part of the Bankruptcy Court.

Respectfully submitted,

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APPENDIX.

[Decision of the Circuit Court of Appeals of the Seventh Circuit handed down November 6, 1939, in direct conflict with the decision of the Eighth Circuit sought to be reviewed.]

In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

October Term and Session, 1939.

No. 6856.
The Carter Oil Company,
Plaintiff-Appellant,
vs.
John F. Welker et al.,
Defendants-Appellees.

No. 6861.
The Carter Oil Company,
Plaintiff-Appellee,
vs.
John F. Welke and Nellie E. Welker,
Defendants-Appellants.

Appeals from the District Court of the United States for the Eastern District of Illinois.

November 6, 1939.

Before SPARKS, TREANOR and KERNER, *Circuit Judges*.

SPARKS, *Circuit Judge*. The Carter Oil Company appeals from a decree dismissing for want of equity its suit

to enjoin appellees from drilling for oil and gas on certain premises claimed by appellant by virtue of a lease to itself. Appellees counterclaimed with a prayer that the lease upon which appellant based its claim be amended to exclude the premises in dispute, and that appellees' title to those premises be quieted and confirmed in themselves.

This appeal presents the question of the construction of a deed executed in 1912 which appellant contends merely conveyed an easement in the strip of land involved, leaving the fee simple interest in the grantor from whose successors in title it obtained the lease upon which this action is predicated.

The deed in question, executed on a printed form captioned a "Right of Way Deed," provided as follows (italicized portions represent those parts which were written in longhand with pen and ink):

> "This Indenture Witnesseth, That Illinoi W. Hess * * * in consideration of the benefits accruing to *her* by reason of the construction and operation of a railroad upon said land, and of the sum of *Two Hundred Fifty—50/100* Dollar, * * * does hereby convey and warrant to Eastern Illinois and Peoria Railroad Company, a corporation organized and existing under the laws of the State of Illinois, as and for its right of way, a strip of land *One Hundred (100)* feet wide, being *Fifty (50)* feet wide on *each side* of a line that has been surveyed and located across and upon the following described real estate, to wit: *Over and across the North-East 1/4 of the North-West 1/4 of Section Eighteen (18), Township Seven (7) North Range Three (3) East of the 3rd P. M. Containing in all Three and Thirty-Four Hundredths acres more or less.*
>
> * * * * * * *"

The strip conveyed was part of a 160-acre tract then belonging to Mrs. Hess, the grantor. At the time of the

execution of the deed there had been a survey, and the strip involved had been marked off by stakes extending across the farm. However, at the time of trial it was testified that the stakes had long since disappeared, and the tenants of the tract across which the strip extended had farmed it along with the balance of the tract. The railroad company had never used the strip for right of way purposes, but it had paid taxes on it from the time of the conveyance. Subsequently the tract was divided between the heirs of Mrs. Hess, and John Welker became the owner of the forty-acre tract across which the 3.34-acre strip previously conveyed to the railroad extended. The partition was made by the parties with the understanding that John would get only 36.66 acres out of the quarter. In addition, he owned several other tracts of land, all of which were included in a lease executed by him and his wife in August, 1936, to one Von Almen who assigned it to appellant, the Carter Oil Company, granting the right to drill for the oil and gas on the premises. The lease described the premises as follows:

> S½ of SE¼ of Sec. 7 containing 80 acres
> NE¼ of NE¼ of Sec. 18 containing 40 acres
> NE¼ of NW¼ Sec. 18 containing 36 66/100 acres
> W. part of N½ of NW¼ and SE¼ of NW¼ of Sec. 8 containing 56 acres, of Section 7-18-8 Township 7 N. Range 3E containing 213 acres, more or less, it being the purpose and intent of the lessor herein to lease all of the lands, however described, owned by the said lessor in the section or sections specified.

Appellees Luttrell, Holleman, and Hinkle began the drilling operations, now sought to be enjoined, in September, 1938. They held a lease covering the west half of the 3.34-acre strip from one Metzger who obtained title to it from one Hausmann to whom the railroad had conveyed it. Metzger also held quitclaim deeds to the 3.34-acre strip

from all the heirs at law of Mrs. Hess. When appellees started drilling their well, the Carter Oil Company was also drilling an oil well 660 feet from its location, and the court found that if the well drilled by Luttrell, Holleman, and Hinkle were brought in, it would drain oil from under the adjoining land, which oil was owned by the Carter Oil Company.

The court concluded as a matter of law that the deed of 1912 from Mrs. Hess to the railroad conveyed the fee simple interest in the real estate involved, which interest was not limited by the definition in the deed of its purpose, "as and for its right of way." It therefore held that the equities were with the defendants and dismissed the bill of complaint for want of equity. It also concluded, however, that the oil and gas lease executed by the Welkers to appellant's assignor would have conveyed the entire interest in the strip had they been the owners of it, hence appellees would not be entitled to the affirmative relief prayed in their answer and counterclaim.

Whether the particular form of deed here involved results in the creation of a fee simple interest in the grantee or only an easement has never been determined by the Illinois courts so far as we can find. The question has been presented to courts of other jurisdictions and they have divided on their decision of it. See cases cited, pro and con, in a footnote to *Magnolia Petroleum Co. v. Thompson*, 106 F. 2d 217 at 227. See also annotations in 84 A. L. R. 271; 94 A. L. R. 523; 66 L. R. A. 36; L. R. A. 1918 B, 695. The difficulty of the question is well illustrated by the fact that opposite conclusions were reached by the District Court in the case at bar (see *Carter Oil Co. v. Welker*, 24 F. Supp. 753) and the Court of Appeals for the Eighth Circuit in the Magnolia case, *supra*, both after very scholarly study of the issues and the authorities upon precisely the same type of deed and both arising un-

der the Illinois law. Since the opinions in both of those cases contain excellent analyses of the significant cases bearing on the subject as well as the applicable Illinois statutes,[1] we deem it unnecessary to repeat that discussion here, and therefore refer to only a few of the cases.

While the Illinois courts have not passed on the identical question involved, there are several cases to the effect that the recitation of the purpose of the conveyance does not limit the title conveyed. See *Supervisors v. Patterson*, 56 Ill. 111; *Tinker v. Forbes*, 136 Ill. 221; *Downen v. Rayburn*, 214 Ill. 342, all relied upon by the District Court. In these cases we find the conveyance of a lot or tract, "for a courthouse and other county buildings," "also for the purpose of locating proper water wheel and races to draw water," "to be used as a church location," all of which conveyances were held to transfer the fee simple interest, notwithstanding the recitation of purpose. The Magnolia case holds that these cases are not authority for the construction of the deed here involved for the reason that in those cases the question was whether a fee simple was conveyed or only a determinable fee, and that in such cases the courts do not look with favor upon conditions subsequent, hence will not construe words indicating purpose or use as restrictions. The situation is different, it holds, when the question is whether a fee is conveyed or only an easement, in which case words "which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed."

We do not agree with this distinction. To us, the significant question appears to be, whether *land* is conveyed by the deed, or merely a *user* of the land. Much of the confusion on this subject has arisen from failure to distinguish between deeds granting the land and deeds grant-

[1] Illinois Revised Statutes, 1937, chap. 30, section 12; chap. 114, section 20 (3).

ing a right of way over the land. For example, 1 Thompson on Real Property 534, section 421, states: "Where the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed." The Magnolia case quotes this as stating the generally accepted rule, apparently accepting it as authority for the construction of deeds similar to the one here involved. However, the three cases cited by Thompson as supporting his statement involve deeds which are quite unlike the one involved in the case at bar and in the Magnolia case. In *Jones v. Van Bochove*, 61 N. W. 342, the deed conveyed "the right of way for a railroad * * and described as follows: 'A strip of land * * *.'" In *Blakely v. Chicago R. Co.*, 64 N. W. 972, the significant words were: "Do hereby grant, bargain, sell, and convey unto the * * (R. R. Co.) its successors and assigns, for right of way *and for operating its railroad only.*" (Our italics.) *Biles v. Tacoma, O. & G. H. R. Co.*, 32 Pac. 211, involved a conveyance by the Northern Pacific Railroad of a forty-acre tract which it then owned, to one Biles, by warranty deed, "reserving and excepting therefrom, however, a strip of land extending through the same * * two hundred feet on each side of the * * (railroad) to be used for a right of way or other railroad purposes * *." Later another railroad laid tracks across the strip and the grantee sought to oust it, claiming title to the land. The court discussed the technical distinction between the words "reserve and except" and decided that since both were used, it became necessary to look at all the surrounding circumstances to determine that an easement was intended to be reserved rather than the fee in the strip excepted. Since none of the cases cited to the text involves a deed conveying a strip of land as and for a right of way, we do not consider the statement of the rule applicable here.

A similar failure to analyze the deed involved is found in 16 Am. Jur. on Deeds, section 245, which states the rule: "If, in a deed to a railroad, the land conveyed is described as a right of way, the deed may be construed as giving an easement right only, and not the full fee, notwithstanding there are other words in the deed referring to the fee simple, for such a conveyance does not imply a grant of the easement forever." The case cited as authority for this rule is *East Alabama R. Co. v. Doe*, 114 U. S. 340. We find, however, that in that case, there was no land conveyed, but the deed recited: "* * doth give, grant, bargain and sell unto the said railroad company * * the right of way over which to pass at all times * * * and to this end the limit of said right of way shall extend * *" Clearly this was intended to convey only a *right* and not *land*, and the rule as stated above only confuses the issue.

We conclude that, in the absence of a contrary decision by the Illinois courts, we prefer to follow the rule that a deed conveying a strip of land, even though the purpose be recited, is to be construed as conveying a fee simple interest in the grantee rather than an easement of use. We do not agree with appellant's contention that the words "over and across" written in longhand in the deed limited the conveyance to an easement. We think the words "over and across" refer only to the surveyed line by which the exact location of the land was to be determined.

Appellant also contends that, even though the deed might be construed as intended to pass the fee interest, it was void for indefiniteness of description. We do not agree with this contention. While the deed did not specify the exact location of the strip by metes and bounds, it referred to a survey previously had by which the exact location could be ascertained, and this was sufficient to render the deed effective, particularly in view of the fact that stakes were driven along the line at the time. See 4 Thompson on Real Property (1924), §§ 3074, 3095.

Decree affirmed.